

NO. 45443-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BRINESH PRASAD,

Petitioner.

**BRIEF OF AMICUS CURIAE STATE OF WASHINGTON,
DEPARTMENT OF LICENSING**

ROBERT W. FERGUSON
Attorney General

SCHUYLER B. RUE
Assistant Attorney General
WSBA # 42167
PO Box 40110
Olympia, WA 98504-0110
(360) 586-2588
OID# 91029

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY AND INTEREST OF AMICUS CURIAE	2
III.	ISSUES ADDRESSED BY AMICUS	2
IV.	ARGUMENT	2
	A. To Assist in Driving While License Suspended Proceedings, the Department Prepares a CCDR Containing a Combination of Testimonial Statements and Non-Testimonial Public Records.....	2
	B. McQuade Testified That He Independently Reviewed the Record and, Based on the Review, Determined That Prasad Was Revoked.....	7
V.	CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	5, 9, 10
<i>State v. Lui</i> , 179 Wn.2d 457, 315 P.3d 493 (2014).....	10, 11
<i>State v. Mares</i> , 160 Wn. App. 558, 248 P.3d 140 (2011)(citing <i>Melendez-Diaz</i> , 129 S. Ct. at 2539–40)	6, 7
<i>State v. O'Cain</i> , 169 Wn. App. 228, 279 P.3d 926 (2012) (citing <i>Melendez-Diaz v.</i> <i>Massachusetts</i> , 557 U.S. 305, 129 S. Ct. 2527, L. Ed. 2d. 314 (2009))	4

Statutes

RCW 46.01.030	2
RCW 46.20	2
RCW 46.20.3101	5, 6
RCW 46.20.342(b).....	4
RCW 46.52.120	2, 6
RCW 46.52.130	6
RCW 46.52.130(1).....	2, 6

Rules

CRrRLJ 6.13	3
CRrRLJ 6.13(e)(1)	3, 5

CRrRLJ 6.13(e)(2)(i)	3
CRrRLJ 6.13(e)(2)(ii)	3
CRrRLJ 6.13(e)(2)(iii)	3

Constitutional Provisions

U.S. Const. amend. VI	9
-----------------------------	---

I. INTRODUCTION

The Department prepares certified copies of driving records (CCDRs) for use in criminal Driving While License Suspended proceedings. The CCDR identifies whether a person was suspended on a particular date and provides copies of the record supporting the conclusion.

If a driver subpoenas a witness to testify about the CCDR, the Department often assigns the case to an employee other than the one who prepared the CCDR to independently review the record and reach his or her own conclusion about what the record shows. The Department responds to a large volume of personal appearance subpoenas across the state. Given the resources available to the Department, it is not feasible to always send the same person who prepared the CCDR to testify at trial. This practice does not violate the confrontation clause. A person has the right to confront the testimonial statements of the live witness whose analysis establishes an element of the crime, not the person who prepared the CCDR. Using the out-of-court certification of the preparer of the CCDR to authenticate the supporting public records is not an interpretive act requiring confrontation. In any event, the live witness is able to authenticate the record based on his or her independent review of the record.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Department administers and enforces the issuance, suspension, and revocation of driver's licenses under chapter 46.20 RCW. The Department maintains a record of convictions, administrative actions, accidents, and the status of a person's driver's license. RCW 46.01.030, RCW 46.52.120, RCW 46.52.130(1). The Department routinely produces employees to testify regarding a person's driving record in driving while license suspended matters.

III. ISSUES ADDRESSED BY AMICUS

1. May the Department produce a witness at trial who is not the person who prepared the certified copy of the driver record if the witness reviews the record and independently reaches a conclusion about whether the driver was suspended on a particular date?

IV. ARGUMENT

A. To Assist in Driving While License Suspended Proceedings, the Department Prepares a CCDR Containing a Combination of Testimonial Statements and Non-Testimonial Public Records

As a part of its duty to maintain records related to licensed drivers, the Department prepares certified copies of the drive records (CCDRs) for use in criminal Driving While License Suspended matters. A CCDR is typically requested by a prosecutor – less often by the defense – on a form

that requires identification of the driver and the date of the offense. In response, the Department prepares and delivers a CCDR. In 2013, the Department produced 62,392 CCDRs in response to prosecution and defense requests.

The Department maintains a court unit that exclusively processes CCDRs and responds to personal appearance subpoenas. The unit comprises of one manager and 10 customer service specialists. When preparing a CCDR, one of the 10 customer service specialists reviews the record and reaches a conclusion about the status of a person's driving privilege on the date of the offense.

In many proceedings, the CCDR is the only evidence from the Department showing that a person's license was suspended or revoked at the time of the offense. In criminal courts of limited jurisdiction, Washington utilizes a notice-and-demand rule that governs the exercise of a defendant's confrontation right. CRrRLJ 6.13. The prosecutor provides an advance copy of a CCDR to the defense. CRrRLJ 6.13(e)(2)(i), (ii). Absent a demand by the defense for production of a records custodian, the CCDR is admissible in lieu of testimony. CRrRLJ 6.13(e)(1), (e)(2)(iii). Washington courts may adopt procedural rules governing the exercise of such demands. *State v. O'Cain*, 169 Wn. App. 228, 239, 279 P.3d 926,

931 (2012) (*citing Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326, 129 S. Ct. 2527, L. Ed. 2d. 314 (2009)).

With this in mind, the Department compiles the CCDR in a manner that provides enough analysis and supporting information to demonstrate that a person was suspended on the date of the offense such that no further testimony is required if a defendant does not demand the production of an records custodian. As in this case, the CCDR typically includes three separate records. The Department prepares the CCDR with the elements of driving while license suspended in mind, including that the State must prove: 1) an order of suspension or revocation prohibiting operation of a motor vehicle was in effect on the date of the offense and, 2) the suspension was the result of one of 20 specifically enumerated reasons. RCW 46.20.342(b). In this case, the State was required to prove that the reason for the suspension was “an administrative action taken by the department under chapter 46.20 RCW.” RCW 46.20.342(b).

The first document in a CCDR is a cover letter, prepared by a Department employee after a request has been received. Trial Exhibit 2. The cover letter is signed by Shannon Smiley. *Id.* The letter serves two purposes. First, it reaches a conclusion about a person’s driving status on the date of the offense. Second, it attaches and authenticates the relevant public records that support the conclusion.

Under *State v. Jasper*, the conclusion that a person was suspended on a particular date is a testimonial statement that goes beyond the mere authentication of an admissible public record. 174 Wn.2d 96, 116, 271 P.3d 876, 887 (2012). Rather, this conclusion is an interpretation of what the record contains or shows, and certifies its substance or effect. However, the attachments to the cover letter are public records, not prepared in anticipation of litigation. *Id.* *Jasper* acknowledged that the mere authentication of records would not be testimonial. *Jasper*, 174 Wn.2d at 115. Having the cover letter serve a testimonial function (not admissible if a witness is demanded) and non-testimonial function (admissible to authenticate public records) is necessitated by the model certification provided by court rule. CRrRLJ 6.13(e)(1).

The second document in the CCDR is typically a copy of the order that was in effect at the time of the offense.¹ In this case, the order in effect at the time of the offense was a letter on the Department's letterhead entitled "Notice of Revocation." Trial Exhibit 1. By its terms, the letter established that a license revocation would become effective October 6, 2011, absent a request for an administrative hearing. *Id.* The letter stated that the basis for the action was RCW 46.20.3101, which establishes an administrative license revocation for a driver's refusal to take a breath or

¹ In some cases there may be several orders that apply on the date of the violation or arrest.

blood test under the implied consent law. *Id.* This document is not testimonial because it neither interprets the driver record nor certifies the effect of the notice of revocation. *State v. Mares*, 160 Wn. App. 558, 564, 248 P.3d 140, 143 (2011)(citing *Melendez–Diaz*, 129 S. Ct. at 2539–40)(DOL certification authenticating copy of defendant’s driver’s license was not testimonial because it attested only to the existence of a particular public record and did not interpret the record nor certify its substance or effect).

The third document is a copy of the driver’s abstract. Trial Exhibit 3. A driver’s abstract is a record required to be maintained by RCW 46.52.120 (“The director shall keep a case record on every motor vehicle driver licensed under the laws of this state, together with information on each driver, showing all the convictions and findings of traffic infractions certified by the courts. . . .”), and its contents are further prescribed by RCW 46.52.130(1) to include the status of a person’s driving privilege in the state. The abstract summarizes traffic convictions, administrative findings against a licensee, and the actions taken against a person as a result. RCW 46.52.130, Trial Exhibit 3. Under the section entitled “Driver Record History,” the abstract shows a revocation, the reason for the revocation was the driver “refused the breath/blood test,” and the date range for the revocation was October 6, 2011, until October 6,

2015. Again, this document is not testimonial because it neither interprets what the record contains nor certifies the effect of the notice of revocation. *State v. Mares* at 564.

The CCDR creates a closed universe of records that, taken together, are sufficient to establish that a person's license was revoked on a particular date. Here, the cover-letter signed by Shannon Smiley contained the ultimate conclusion about Prasad's status on the date of the offense. The notice of revocation and abstract provide the non-testimonial information supporting that conclusion.

B. McQuade Testified That He Independently Reviewed the Record and, Based on the Review, Determined That Prasad Was Revoked

When responding to a personal appearance subpoena, a customer service specialist repeats the same process used to compile the CCDR: the customer service specialist independently reviews the driver's record and reaches a conclusion about a driver's status on the date of the offense.

The Department received 4,171 personal appearance subpoenas for criminal matters in 2012, and 4,677 personal appearance subpoenas in 2013. Because of that volume, the Department does not always assign the same employee who completed the CCDR to provide testimony trial. This flexibility allows the Department to accomplish a complex scheduling task that requires 10 customer service specialists to comply with an average of

390 monthly subpoenas that originate from 61 district courts and 226 municipal courts. Flexibility is also necessary due to the frequent last-minute and sometimes indefinite continuances of these court cases (if, for example, a witness or even the defendant does not show for trial). Without this flexibility, the Department would either need additional staff or would be unable to timely comply with all the subpoenas it receives, which would likely result in increased continuances or dismissals.

The Department's administrative process for efficiently responding to and complying with subpoenas does not create a constitutional dilemma. Prasad repeatedly argues that McQuade "parroted conclusions," was a mere "stand-in," and was "impossible to cross-examine." Appellant's Reply Brief at 19, 20. Implicit in these assertions is Prasad's mistaken assumption that the Department has an unknown expert who analyzes the record and a "witness of the day" attends court to recite the conclusion. But no such person exists. One witness could not analyze 62,392 drivers' records a year. More importantly, the record does not support Prasad's contentions that McQuade was a straw man. In relevant part, McQuade testified that he had reviewed the record and concluded that Prasad was revoked at the time of the offense:

Prosecutor: . . . And as part of your job as a Records Custodian, did you review the official record in Olympia?

McQuade: Yes.

Prosecutor: And as far as the documents you're holding in front of you which have been admitted, do those appear to be true and correct copies of the exhibits - or of the documents that you reviewed in Olympia?

McQuade: Yes they are.

Prosecutor: Okay. And what was - upon review of the record, what was Mr. Prasad's driving status on the incident date of 3/24/2012?

A: Revoked.

Report of Proceedings (RP) at 60.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. In *Jasper*, the Washington Supreme Court determined that a person has a right to confront testimonial statements made by Department custodians of records. *Jasper*, 174 Wn.2d at 125. A DOL record custodians determination regarding the defendant’s driving status on a particular date is subject to confrontation because it interprets what the record contains or shows, and certifies its substance or effect. *Id.* at 115.

Recently, the Washington Supreme Court announced a new analytical framework for determining when the confrontation right applies to expert testimony. *State v. Lui*, 179 Wn.2d 457, 480, 315 P.3d 493

(2014). Under the plain language of the constitutional provision, a person becomes a “witness” by attesting to facts, but the word “against” indicates that the facts attested to must be adversarial in nature. *Id.* In applying the test, the court determined that a person who takes a temperature reading of a body is a “witness” because they create factual information for later use at court. *Id.* at 493. But without an expert’s intervening analysis, the temperature reading by itself was not testimony “against” the defendant because it did not inculcate him. *Id.* at 493. Unlike *Lui*, McQuade independently gathered the data (information contained within Prasad’s record) *and* analyzed what the record showed. However, the rationale and result in *Lui* is consistent with the holding in *Jasper*: a record custodian’s statement interpreting the driver’s record requires confrontation, not necessarily the data or information supporting the custodian’s analysis.

In this case, the State did exactly what the Court required in *Jasper*. The Department produced McQuade to establish that Prasad’s license was revoked at the time of the offense. McQuade testified that he had reviewed the official record and, based on his independent review, determined that Prasad’s license was revoked on the date of the offense. RP at 60. McQuade’s testimony was sufficient to establish that he had used his expertise as a records custodian to reach an independent conclusion about Prasad’s record. Prasad then had an opportunity to

confront McQuade with regard to the basis for those testimonial statements, but did little to test the scope or manner of McQuade's records review. Prasad's cross examination focused on how the abstract of driving summarized information from the driver record. RP 68-71. The fact that the cross-examination was ultimately unavailing is not of constitutional consequence. The confrontation clause guarantees the right to confront a witness; it does not guarantee a successful cross-examination of that witness.

It is well settled that a defendant's confrontation right is not satisfied by a witness who simply parrots the conclusions of another. See e.g. *State v. Lui*, 179 Wn.2d 457, 482, 315 P.3d 493 (2014). Here, McQuade did not parrot the conclusions contained in the cover letter. He independently reviewed the driver's record and determined that Prasad's license was revoked at the time of the offense. RP at 60. The fact that McQuade reached the same result as the cover letter is not, by itself, evidence that McQuade was acting as a conduit for the conclusions contained in the cover letter.

In a colorful exchange with McQuade, Prasad's counsel established that McQuade had not seen the identical exhibits contained in the CCDR until the prosecutor reviewed it with him at the courthouse on the morning of trial. RP 35-39. In support of his confrontation challenge,

Prasad argues that the inference from this testimony is that McQuade had not reviewed Prasad's driver's record at all until he saw the CCDR at the courthouse. Prasad fundamentally misinterprets the entirety of McQuade's testimony. McQuade's later testimony makes clear that he had reviewed true and correct copies of the relevant records prior to attending trial. RP at 60.

Prasad argues that McQuade should have either personally brought copies of the Department's records when testifying or the State must establish a chain of custody for the records. Typically, Department witnesses do not bring copies of any records to trial. Instead, the Department relies on the prosecution to select portions of the CCDR to review with the witness. Those documents are admissible under the public records exception based on the certification in the cover-letter, and if not, the Department's witness can authenticate the documents based on his or her independent review of the record. Shannon Smiley's certification with regard to Prasad's driving status on the date of the offense was subject to confrontation and should not have been considered. However, McQuade's live testimony made the error harmless.

Finally, Prasad argues that a Department witness must testify that he conducted a "diligent search" in order to sustain a conviction and the prosecutor's failure to elicit such testimony was error. Petitioner's Reply

Brief at 19. The absence of these express words in testimony is not a prerequisite to a prima facie showing that Prasad was revoked on a particular date. Primarily, it is the existence of a record (the Notice of Revocation) that demonstrates this element of the crime and the search required is only to confirm that the Notice of Revocation remained accurate. McQuade testified that he had reviewed the driver's record maintained in Olympia and concluded that Prasad was revoked. RP at 60. The Department's cover-letter in the CCDR routinely states that a "diligent search" was performed, but the affidavit anticipates areas that would normally be covered in cross-examination. The scope and manner of the records search and whether an anomalous record might exist that could have reinstated the driving privilege is an area appropriate for cross-examination. But Prasad had the benefit of a live witness to perform such a cross examination – he simply elected not to question the extent of McQuade's search.

//

//

//

//

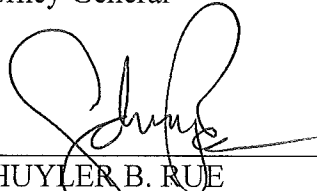
//

V. CONCLUSION

The testimony of McQuade established that he had reviewed the record and determined that Prasad was suspended on a particular date. McQuade's testimony satisfied Prasad's confrontation right. The Department respectfully requests that Prasad's conviction be affirmed.

RESPECTFULLY SUBMITTED this 15th day of July, 2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read 'Schuyler B. Rue', is written over a horizontal line.

SCHUYLER B. RUE
Assistant Attorney General
WSBA # 42167
Attorneys for State of Washington

NO. 454432

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BRINESH PRASAD,

Petitioner.

DECLARATION OF
SERVICE

I declare that on July 15, 2014, I caused to a copy of Motion of the Washington State Department of Licensing to File Amicus Curiae Brief, Brief of Amicus Curiae State of Washington Department of Licensing, and this Declaration of Service in the above-captioned matter be served on all parties herein by way of United States Postal Service First Class Mail and Electronic transmission as follows:

Attorney for Petitioner

Roger A. Bennett
112 W. 11th Street, Suite 200
Vancouver, WA 98660-3359

Email:
rbenn21874@aol.com

Attorney for City of Vancouver

Lacey Blair
Vancouver City Attorney's Office
PO Box 1995
Vancouver, WA 98668-1995

Email:
lacey.blair@ci.vancouver.wa.us

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 15th day of July, 2014.

Bibi Shairulla
Bibi Shairulla, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

July 15, 2014 - 2:06 PM

Transmittal Letter

Document Uploaded: 454432-Amicus Brief.pdf

Case Name: City of Vancouver, Respondent v. Brinesh Prasad, Appellant

Court of Appeals Case Number: 45443-2

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Amicus

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Proof of Service will be filed separately

Sender Name: Bibi S Shairulla - Email: BibiS@atg.wa.gov

A copy of this document has been emailed to the following addresses:

rbenn21874@aol.com

lacey.b.air@ci.vancouver.wa.us

schuylerR@atg.wa.gov